GKM AMAL BHD

v.

BANK UTAMA (MALAYSIA) BHD

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
NIK HASHIM JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: 02-225-00]
19 JANUARY 2004

COMPANY LAW: *Winding up - Petition - Advertisement, timing of - Petition advertised earlier than 'seven clear days before hearing' of petition without direction of court - Whether advertisement irregular - Whether unjust and prejudicial to debtor - Whether advertisement invalidated - Whether irregularity curable - Whether advertisement must appear precisely on the seventh day preceding hearing of petition - Companies (Winding-up) Rules 1972, rr. 24, 194*

This was an appeal by the appellant company ('the debtor') against the decision of the High Court winding it up under s. 218 of the Companies Act 1965. The debtor's principal complaint before the justices of appeal, as it was before the learned judge, was that the winding-up petition was not advertised in strict compliance with r. 24 of the Companies (Winding-up) Rules 1972 ('the Rules'), videlicet, it was, without the direction of the court, advertised earlier than 'seven clear days before the hearing' of the petition. It was submitted that r. 24 of the Rules mandates the advertisement of a winding-up petition to be made precisely on the very seventh day preceding the hearing of the petition.

Held (dismissing the appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] The petition was to be heard on 17 September 1999 and ought, therefore, to have been advertised on 10 September 1999 in compliance with r. 24 of the Rules. It was, however, advertised on 26 and 27 August 1999, to wit, 22 days before the hearing of the petition without the direction of the court. This was a breach of r. 24 of the Rules. Nevertheless, this irregularity was one that was curable under r. 194 of the Rules. This was because the irregularity in the advertisement of the petition did not prejudice or cause any injustice to the debtor, and could even have been beneficial to the creditors. (p 772 b-d)

[Advertisement of petition valid.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh syarikat perayu ('penghutang') terhadap keputusan Mahkamah Tinggi yang menggulungnya di bawah s. 218 Akta Syarikat 1965. Bantahan utama penghutang di hadapan hakim-hakim rayuan, sepertimana bantahannya di hadapan yang arif hakim, adalah bahawa petisyen penggulungan tidak diiklankan secara yang menepati kehendak per. 24 Peraturan-peraturan Syarikat (Penggulungan) 1972 ('Peraturan'), yakni, ianya, tanpa arahan mahkamah, diiklankan lebih awal dari "tujuh hari penuh sebelum pendengaran" petisyen. Dihujahkan bahawa per. 24 Peraturan mewajibkan pengiklanan petisyen penggulungan dibuat tepat pada hari ketujuh sebelum petisyen didengar.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR menyampaikan keputusan mahkamah:

[1] Petisyen akan didengar pada 17 September 1999 dan kerana itu haruslah diiklankan pada 10 September 1999 sebagai mematuhi per. 24 Peraturan. Ia bagaimanapun telah diiklankan pada 26 dan 27 Ogos 1999, iaitu, 22 hari sebelum pendengaran petisyen tanpa apa-apa arahan mahkamah. Ini melanggari per. 24 Peraturan. Namun begitu, ketidakteraturan ini boleh dipulihkan di bawah per. 194 Peraturan. Ini kerana ketidakteraturan dalam mengiklankan petisyen tidak memprejudis atau menyebabkan sebarang ketidakadilan kepada penghutang, ia malah mungkin bermanfaat kepada pemiutang-pemiutang.

Pengiklanan petisyen sah.]

Case(s) referred to:
Bank Utama (M) Bhd v. GKM Amal Berhad [2000] 2 CLJ 525 HC ***(foll)***
Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 221(2)
Companies (Winding-Up) Rules 1972, rr. 24, 194(1)

For the appellant - Ong Chee Keong; M/s Ong Manickam & Co
For the respondent - Lim Siew Ming; M/s Raja Darryl & Loh

*[**Editor's note:** For a recent case on r. 24 of the Companies (Winding-up) Rules 1972, please see also the decision of Hishamudin Yunus J in Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd [2003] 1 CLJ 777.]*

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:

The facts are that on 16 October 1998, the High Court of Kuala Lumpur recorded a summary judgment against the appellant company *vide* Kuala Lumpur High Court Civil Suit No. D6-22-1187-1998. Pursuant to the aforesaid summary judgment, the petitioner (respondent before us) filed a winding-up petition No. D2-28-553-1999 to wind up the appellant company for failure to comply with a notice of demand pursuant to s. 218 of the Companies Act 1965 (the Act). An order for winding-up was granted to the respondent dated 25-2-2000 and the appellant company, being dissatisfied with the aforesaid order, appealed to this court.

In this case, the petition was not advertised seven clear days before the date of hearing on 17 September 1999. The petition was advertised in the newspapers, the Malay Mail and the Star on 26 August 1999 and 27 August 1999, ie, 22 days before the hearing date. The appellant contended that by r. 24 of the Companies (Winding-Up) Rules 1972 (the Rules) which states that "every petition shall be advertised in Form 4 seven clear days or such longer time as the court may direct before the hearing", the petition ought to be advertised on 10 September 1999, and since the respondent did not obtain the leave of the court to advertise the petition earlier than the time stipulated, the respondent was in breach of the r. 24 and therefore the petition, being invalid, ought to be cancelled.

In his judgment, which was reported in *Bank Utama (M) Bhd v. GKM Amal Berhad* [2000] 2 CLJ 525 at p. 527, Abdul Aziz J (as he then was) held:

> In this case the advertising was, without court direction, done earlier than the seven days. Technically, therefore, it is an irregularity. Since, however, it does not do injustice to anybody and is, on the contrary, beneficial to creditors, I rule that it is an irregularity which, by virtue of r. 194, does not invalidate the advertisement.

The issue was whether the breach was an irregularity under r. 194 of the Rules.

In *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390, a winding-up petition was filed by creditors against the company and the hearing was fixed for 12 December 1983. The Gazette of 24 November 1983 was put into circulation on 12 December 1983. A preliminary objection was raised on behalf of the Company that the petition has not been advertised in the Government Gazette at least seven clear days to the notice. George J (as he then was), in exercising the powers under s. 221(2) of the Act, directed that a new date for hearing be

fixed and dispensed with the need to advertise the new hearing date whether in newspapers or the gazette. On appeal, the Supreme Court (at [1987] 1 MLJ 39) ruled that the learned judge had properly exercised his discretion in dispensing with the advertisement, and dismissed the appeal.

In the present case, however, there was no direction by the court under s. 221(2) of the Act to have the advertisement done earlier than the seven days, and hence the petition was advertised in breach of r. 24. Nevertheless, we agreed with the views of the learned judge. There was no injustice caused by the breach. The breach was a technicality amounting to a mere irregularity curable under r. 194(1) which states:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

Therefore, we held that the petition was not rendered invalid by reason of the irregularity.

The whole purpose of advertisement is to give notice of a winding-up petition of a company to the creditors. As the petition in this case was advertised more than the stipulated period of seven days, and that the advertisement was already effected, the object of giving notice to the creditors had been achieved. The appellant cannot be said to be prejudiced by the advertisement. Thus, we found that the learned judge was right in his decision.

That being the case, we dismissed the appeal with costs and ordered the deposit be paid out to the respondent to account of its taxed costs.